NeilMed Products, Inc. *and* Teamsters Local 624, International Brotherhood of Teamsters, Change to Win Coalition. Case 20–CA–035363

February 29, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On July 11, 2011, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, NeilMed Products, Inc., Santa Rosa, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize or deal with Elmer Cisneros as a business agent for the bargaining unit employees and denying him access to the facility necessary for the performance of his collective-bargaining duties.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize Elmer Cisneros as a business agent for the bargaining unit employees and allow him access to the facility to perform his collective-bargaining duties.

(b) Notify the Union in writing, within 10 days of this decision, that it no longer has any objection to dealing with Elmer Cisneros and that it will do so on request.

(c) Within 14 days after service by the Region, post at its Santa Rosa, California facility copies of the attached notice marked "Appendix"[4] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its

[1] We agree with the judge's ruling that Union Witness Elmer Cisneros did not violate her sequestration order by allegedly taking photographs of witnesses during a break from the hearing. We also note that there was no allegation before the judge, and there is none before us, that the Union engaged in witness intimidation in violation of Sec. 8(b)(1)(A) of the Act. We do, however, correct the judge's statement that "no further mention" was made of the alleged photographing after the Respondent's counsel initially raised the issue. In fact, the incident was briefly revisited twice more during the hearing: one witness testified that she was photographed, and another witness was asked whether she was photographed. Each time, the judge immediately halted any further questioning on the matter, and we find that she did not err in doing so.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 544–545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) by denying the Union's chosen bargaining representative, Elmer Cisneros, access to the Respondent's facility. In doing so, we reject the Respondent's argument that the judge applied an incorrect legal standard. The judge acted in accordance with Board precedent, under which the proper inquiry is whether there is "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976). The Board has applied this standard in deciding similar refusal-of-access cases. See, e.g., *Claremont Resort & Spa*, 344 NLRB 832, 834–835 (2005); *Pan American Grain Co.*, 343 NLRB 205, 206–207 (2004); *Victoria Packing Corp.*, 332 NLRB 597, 597–598 (2000); *Long Island Jewish Medical Center*, 296 NLRB 51, 71–72 (1989).

In addition, we reject the Respondent's contention that the judge erred in failing to consider its assertions that the Union did not have a "superseding need" for Cisneros to be its business agent and that the Union acted in bad faith in appointing him. As to the former, such evidence is irrelevant because the Board does not require a party to demonstrate a particular need for its chosen bargaining representative. See *Fitzsimons Mfg. Co.*, 251 NLRB 375, 378–379 (1980) (reciting the general rule that each party may select whomever it wishes to be its bargaining representative and the other party has a duty to bargain with that individual), enfd. 670 F.2d 663 (6th Cir. 1982). As to the latter, the Respondent failed to present any evidence establishing that the Union acted in bad faith in appointing Cisneros as business agent. That the Respondent had terminated Cisneros and refused to reinstate him does not establish bad faith, as such actions would not serve to disqualify Cisneros from serving as a bargaining representative. See, e.g., *Caribe Staple Co.*, 313 NLRB 877, 889 (1994) (finding that an employer may not insist that a bargaining representative be excluded from negotiations solely because that individual has been terminated).

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees by such means.[5] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Carmen León, Esq., for the Acting General Counsel.
Diane Aqui, Esq., of Santa Rosa, California, and *Karen Tynan, Esq.,* of Healdsburg, California, for the Respondent.
Teague Pryde Paterson, Esq. (Beeson, Tayer & Bodine), of San Francisco, California, for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. This case was heard in Santa Rosa, California, on April 20 and 21, 2011, pursuant to the amended complaint and notice of hearing (the complaint) issued March 31, 2011, alleging that NeilMed Products, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] by denying Teamsters Local 624, International Brotherhood of Teamsters, Change to Win Coalition (the Union) Business Agent Elmer Cisneros (Cisneros) access to its facility.[2] Respondent defends this allegation arguing that its duty to provide a safe workplace requires that Cisneros be denied access to its facility.

All parties were provided full opportunity to appear, to introduce relevant evidence, to examine and cross examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsels for the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Respondent is an Employer Engaged in Commerce within the Meaning of Section 2(2), (6), and (7) of the Act.

Respondent is a corporation engaged in the manufacture and sale of pharmaceuticals. During calendar year 2010, Respondent derived gross revenues in excess of $500,000 and purchased goods valued in excess of $5000 which originated from points outside the state of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

The Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[5]

Pursuant to a NLRB conducted secret-ballot election, the Union was certified on September 1, 2009.

The Union was certified as the exclusive collective-bargaining representative of employees on September 1, 2009,[6] in the following appropriate unit:

> All full-time and regular part-time warehouse, production and driver employees including machine operators, operators, assemblers, material movers, mail marketing helpers, shippers, and receivers employed by the Employer at its facility located at 601 Aviation Blvd, Santa Rosa, California; excluding all other employees, including quality control employees, office clerical employees, confidential employees, managers, guards, and supervisors as defined in the Act.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of unit employees.

Respondent admits and I find that based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of unit employees at all times material herein.

After 22–25 bargaining sessions, the parties reached agreement on a first contract on November 19, 2010.[7]

The parties participated in 22–25 bargaining sessions, and all parties stipulate that the last six bargaining sessions were held as follows: July 19, 28, August 3, October 8, November 2, and 19. The parties reached agreement at the last session on November 19. The term of this agreement is from November 19, 2010, through November 18, 2011. None of these bargaining sessions were held at Respondent's premises.

From May 20 to November 19 the Union engaged in picketing at Respondent's premises.

Beginning on May 20 and lasting until November 19, the Union engaged in picketing at Respondent's premises along Aviation Boulevard, a two-way street running east/west. Picketing typically began at 4:45 a.m. In the early months of picketing, 15–20 picketers were present in the morning at this time. Arriving cars lined up at the gate to wait for a supervisor to arrive. Once the supervisor arrived, the guard unlocked the gate and the cars drove across the picket line. Cisneros served as picket captain throughout the strike.

Besides patrolling along the entrance to the facility, the picketers also yelled such things as "suck ups," "sell outs," "we are picketing for justice," "barberos," "banditos,"[8] and "defienden

[5] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

[1] 29 U.S.C. Sec. 158(a)(1) and (5).

[2] The underlying unfair labor practice charge was filed by the Union on December 22, 2010.

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] 29. U.S.C. Sec. 152(2), (6), and (7).

[5] 29 U.S.C. Sec. 152(5).

[6] 20–RC–18262.

[7] Unless otherwise referenced, all further dates are in 2010.

[8] Cisneros testified that this was the closest Spanish word for the term "scab."

sus derechos"[9] at employees crossing the picket lines. In turn, employees crossing the picket line yelled that the picketers were idiots, cocksuckers, lazy, and should get back to work. Obscenities were exchanged.

Maria Chavez claimed that Cisneros and other picketers walked in front of her car every day, sometimes forcing her to stop. She testified that Cisneros said, "If I wasn't with them, something bad would happen to me." Chavez agreed that all of the picketers yelled at her but she felt Cisneros was the worst. He yelled things like "scab, banditos, rat, and thief." Chavez felt these words were directed specifically to her although she was in a line of about 100 cars. Chavez said that sometimes Cisneros hit her car with the picket sign. Chavez testified that she did not have her car repaired due to any impact from the picket sign.

Although there is plenty of corroboration for Chavez' testimony regarding the name calling, as I have found above, this occurred on both sides of the dispute. I find Chavez' testimony unbelievable in respect to her "belief" that Cisneros was yelling specifically at her. I do not find that Cisneros yelled specifically at Chavez. Rather, I find that Cisneros yelled at many of the employees crossing the picket line. I credit Cisneros testimony that he did not hit Chavez vehicle with his picket sign. As to the alleged statement, "If I wasn't with them, something bad would happen to me," I discredit it as too long a sentence to hear while passing picketers and, in any event, I find it too vague to form a conclusion as to the nature of the alleged statement.

Another employee testified that Cisneros yelled at her, "You have gone on your knees to the doctor [the owner] and [she] was a sell-out." A third employee testified that Cisneros called her a "sell-out" and a "kiss-ass." One time when she crossed the picket line, Cisneros elbowed her driver's side-view mirror. Another time, he stood directly in front of her car. Another witness testified that Cisneros tried to jump in front of her truck on several occasions. There was another report of a female picketer who blocked ingress on a single occasion.

I find that during the picketing, name calling, and obscenities were exchanged on both sides. I find that the picketers, including Cisneros, sometimes impeded or obstructed ingress to the facility. I have specifically discredited testimony that Cisneros blocked specific individual's ingress everyday. I further have specifically discredited testimony that Cisneros threatened employee Chavez.

On June 16 employee/union steward Elmer Cisneros was suspended due to involvement in a picket line incident in which he broke the windshield of a Dodge Caravan as it was driven across the picket line by Supervisor Jonathan Herdita.

There is no dispute that employee Elmer Cisneros was suspended by Respondent on June 16 due a picket line incident of that same date. At approximately 9 a.m., about 10 picketers were patrolling at the Aviation Boulevard entry to Respondent's premises. According to Cisneros,

> I—we were picketing as usual. And my then supervisor, Jonathan Herdita, drove his van into the picketers. And I fell on his hood and I held onto his hood. And he drove for about 20, 30 feet and finally came to a stop.

A statement written by Cisneros and signed by Herdita and Cisneros on June 16, states in relevant part, "I Elmer [Cisneros] will pay for the windshield on the Dodge Caravan . . . because I accidentally broke it." Ultimately Cisneros did not reimburse Herdita.[10] Cisneros agreed that he signed this document because a Sonoma County Sheriff's deputy gave him the option of paying for the windshield or being arrested.

Leticia Alfaro videotaped various incidents at the picket line. On June 16, she videotaped 10 or 15 minutes of various picket line activities and then stopped the tape and put her camera down. About 10 or 15 minutes later, when she saw Mr. Herdita approaching, she turned her camera on again. She explained that the picketers routinely observed Mr. Herdita driving at a fast rate of speed and she usually taped him. Alfaro testified that she had not deleted anything from the videotape segment that involved Mr. Herdita on June 16. I credit Alfaro's testimony in this regard. Alfaro impressed me as a thoughtful, responsible witness who took care in ascertaining the meaning of questions before providing her answer.

Although the videotape segment was admitted in evidence, Respondent renews its objection to the exhibit because it is not the complete document. In other words, Respondent contends that the Acting General Counsel must also provide the 10 to 15 minute segment prior to the incident at issue herein which was taped about 10 to 15 minutes before Mr. Herdita's arrival. I adhere to my ruling at trial. There is no indication that the parties may be misled by an item taken out of context. I find there is no logical connection between the events which occurred after Mr. Herdita's arrival and 10–15 minutes before his arrival.[11]

Respondent also requests that I not assign significant weight to the videotape based upon its lack of completeness. According to the videotape, Herdita arrived at the picket line at 8:39 a.m. In my view, a segment of video which occurred roughly 10–15 minutes prior to Herdita's arrival has absolutely nothing to do with the matter at issue herein. On that basis, I admitted the videotape in evidence.

Cisneros fell across the hood of Herdita's moving vehicle. When the vehicle continued to move forward, Cisneros hit the windshield of Herdita's vehicle twice. There is no dispute that the windshield was broken.

I credit the details shown in the videotape to the same degree I credit Cisneros' testimony. Cisneros' testimony is similar to what the videotape illustrates. There is no other testimony rebutting either the videotape or Cisneros' testimony. According-

[9] Cisneros testified this would mean in English, "Come defend your rights."

[10] Cisneros was served with a temporary restraining order filed on Herdita's behalf by Respondent after he agreed to reimburse Herdita for the damaged windshield.

[11] Respondent claims that the original video tape may contain evidence of provocation of Cisneros "or what actions or activities occurred briefly before Mr. Cisneros hit Mr. Herdita's windshield." It is unclear to me that any potential provocation of Cisneros would be relevant herein. If Respondent meant to claim that Herdita might have been provoked, I note that he did not testify in this proceeding and I infer from his absence that he would not testify that he had been provoked.

ly, I find, as Cisneros testified, that Cisnero did indeed fall onto the hood of the van as the van drove into the picketers. It is not possible to estimate the distance that the vehicle drove while Cisneros was on the hood. It could have been 20–30 feet as Cisneros testified. It could have been a lesser distance. However, the van did proceed forward while Cisneros was lying on the hood.

Thus, when the videotape begins, the van driven by Herdita is proceeding east on Aviation Boulevard. Cisneros is out of view from the driver's perspective because two other picketers are in front of him. The vehicle approaches the left side of the driveway entrance to the facility but ingress is blocked by two picketers.[12] Cisneros may be seen walking across the screen from right to left at this point but he is not one of the two picketers who initially blocked ingress. As the van continues to turn left, the vehicle's driver's side front bumper nears the two picketers who remain stationary. Cisneros turns and approaches the passenger side front bumper at this point. As the vehicle continues to move forward, the two unidentified picketers shift slightly backwards, away from the vehicle, while Cisneros walks toward the center of the front bumper. At this point, Cisneros appears to be quite close to the front bumper and the two unidentified picketers are now behind him. One of the two unidentified picketers moves away from the area and Cisneros looks down at the vehicle's bumper.

At this point, the camera veers to the right and Cisneros is visible only at the left edge of the picture. It is not possible to tell whether the vehicle is moving at this point. The camera then pans back to the left but the vehicle and Cisneros are not visible because an unidentified man holding a picket sign crosses the field of vision. By the time this man exits, Cisneros' legs can be seen just behind the remaining picketer who was blocking ingress when the van initially approached. Based on the position of his legs and the movement of the wheels of the car, it appears that the car moves forward at this point and that Cisneros falls toward the vehicle. The vehicle continues to move forward and Cisneros' feet leave the ground. His picket sign falls to the ground. It does not appear that Cisneros jumped on the vehicle although once on the vehicle, he jerked his body forward to grasp the top rim of the hood by the windshield. The vehicle continues to move forward with Cisneros on the hood of the vehicle. After the vehicle has moved forward about 10 feet, Cisneros hits the windshield with his right hand. The car continues forward and Cisneros hits the windshield again with his right hand. The vehicle then stops. Cisneros slides his feet to the ground and goes around to the driver's side of the vehicle. He has his arms raised out to the side of his body with his hands open wide. He says, "What the hell you doing, man?" The driver emerges and also raises his arms with his hands open wide. The driver walks away and gets out his cell phone. Cisneros also gets out his cell phone and both appear to be making calls. According to the camera clock, these events took place from 8:39 to 8:40 a.m. It is not possible to estimate the speed of the vehicle nor is it possible to accurately determine the distance the vehicle traveled.

Based upon the record as a whole, I find that Herdita provoked the incident by continuing to move his vehicle forward when picketers were blocking his ingress and especially once a picketer became affixed to the hood of his vehicle. I find that Cisneros did not jump on the vehicle but that he did purposefully and recklessly move into an area of danger as the vehicle approached. Once the vehicle came into contact with his legs, Cisneros fell across the hood and then held onto the top rim of the hood. I note that no pack of wild dogs, no approaching train, no assault at gunpoint prevented Herdita from stopping his vehicle when picketers blocked his ingress or when Cisneros fell onto the hood of his car. Moreover, Respondent cites no law or decision which allows a motorist to proceed at will directly into the body of a pedestrian. I, too, am unaware of such law or decision. Accordingly, I find that Herdita provoked Cisneros to hit the windshield when Herdita continued moving forward while a pedestrian was directly in his path and after the pedestrian fell onto his hood.

I reject Respondent's invitation to make findings of fact based upon three redacted[13] police reports. These reports were admitted as public records. None of the police officers were called as witnesses. Thus, a redacted police report dated June 16 sets out conflicting statements from two callers. According to the report, the first caller, assumably Cisneros, reported that his supervisor ran into him with his vehicle and the caller "accidentally hit the windshield with his hand and broke it." The second caller, assumably Herdita, stated that an employee blocked entry to the facility, jumped onto the hood of his car and smashed the windshield with his hand. I can draw no conclusions based upon this report except that both Cisneros and Herdita apparently called the police. This is consistent with Cisneros' testimony. However, the report contains two statements of the facts which are diametrically opposed and does not afford a basis for finding that one or the other of the statements is true.

A second redacted police report indicates that an unidentified individual reported to police that "A MINIVAN CAME THROUGH THE PICKET LINE AND BUMPED A PROTESTER SHO (sic) JUMPED ON THE HOOD OF THE VEH. NO INJURIES." The officer reported that he viewed the video "WHERE ELMER JUMPED ON THE CAR, A (sic) CRACKED THE WINDSHIELD WITH HIS RGIHT (sic) FIST." Denoting the officer's use of the word "jump" about the video as "a factual determination, not an opinion," Respondent asserts that this report proves that Cisneros jumped on the car. Because the video which the officer relied upon is before me, I have made my own factual findings with respect to the video.

Respondent also notes another redacted police report dated May 20, in which an unidentified individual reported that Cisneros walked into the front of her vehicle, yelled at her, and then came to her window claiming that she had harassed him by hitting him. The police report continues that the unidentified reporting individual then reported that Cisneros pointed a video

[12] The record indicates that other drivers entered on the left side of the drive. The record does not indicate whether the right side of the drive was free of picketers.

[13] The name in the "Victim or Caller" portion of the report has been redacted.

camera at her. Finally, the police report notes that the reporting individual stated that her purpose in making the report was to document the incident in case Cisneros filed a report against her. Upon being shown this report, Cisneros denied that he jumped in front of a vehicle, faked an injury, put a video camera in the driver's face, and threatened to call the police. The individual who reported this matter to police was not called as a witness. Respondent argues that the police report must be accepted as true citing specifically to present sense impression and excited utterance. Under the circumstances, I find the statements in the police report unreliable because they were made in anticipation of litigation. Moreover, the individual that made this report to the police was not called as a witness. Finally, I credit Cisneros denial of the incident.

Allegations of cell phone pictures taken outside the Hearing Room.

After a morning break on the first day of hearing, Respondent's counsel reported what she characterized as a potential breach of the sequestration rule as follows:

> . . . some of my witnesses were fearful of Mr. Cisneros, which is the point of my sequestration motion. When these ladies arrived, Mr. Cisneros took out his cell phone camera and snapped photographs of them. They have now been intimidated and this is exactly what I was hoping to prevent by making my motion [to sequester].

In response, I ruled that I found no breach of the sequestration rule. No further mention of this situation was made throughout the remainder of the hearing nor was any witness asked about this issue. Nevertheless, in its brief, Respondent argues,

> Despite the ALJ's refusal to entertain substantial testimony regarding Mr. Cisneros' photographing of witnesses at the hearing, the acts of taking the photographs of Respondent's witnesses (former co-workers of Mr. Cisneros who were already fearful of him) had no legitimate purpose and were meant to intimidate witnesses.

Respondent argues that "Cisneros' actions were reprehensible and objectively seen as an act of intimidation toward the witnesses." This issue was not litigated before me and is not encompassed within the pleadings. I make no finding regarding the statements of counsel about any cell phone photographs.

By letter of August 2, Respondent terminated Cisneros' employment.

Respondent's letter of termination, dated August 2, states,

> We have concluded our investigation of the recent incident wherein a fellow employee's windshield was smashed. We believe the evidence overwhelmingly substantiates that you assaulted the employee and such conduct is not permitted.
>
> Please be advised that effective this date your employment at NeilMed is terminated.

Throughout his suspension and after his termination, Cisneros continued to act as picket captain and continued as an elected member of the Union's bargaining committee.

After his termination, Cisneros continued serving as picket captain at Respondent's premises. He also continued to serve on the Union's bargaining committee after his termination.[14] As noted earlier, none of the bargaining sessions occurred on Respondent's premises.[15] When the contract was finalized, Cisneros translated it from English to Spanish and distributed 45 to 50 copies of the Spanish translation to employees by standing outside Respondent's premises on Aviation Boulevard. There were about 75 employees at that time. An unfair labor practice charge filed by the Union alleging that Cisneros' termination violated Section 8(a)(1) and (3) of the Act was subsequently withdrawn. The lawfulness of Cisneros' August 2 termination is not at issue herein.

On December 15 the Union informed Respondent of appointment of Cisneros as Business Agent of the Union and notified Respondent of an imminent visit to Respondent's premises by Cisneros and Secretary/Treasurer of the Union Miranda.

Secretary/Treasurer of the Union, Ralph Miranda, informed Respondent by email on December 15 that Cisneros had been named Business Agent for the Union and that Miranda and Cisneros "will be visiting the facility this afternoon and tomorrow 12/16/2010 in the morning shift." In response, Respondent requested the purpose of the visit. Miranda responded that the purpose was grievance investigation and membership.

On December 15, Respondent notified the Union telephonically that Cisneros would not be permitted to access Respondent's premises due to the June 16 picket line incident.

On December 15, while Miranda and Cisneros were outside Respondent's facility in a picnic area visiting with employees, Miranda received a call asking that he call Respondent's counsel. Miranda was informed that Respondent would not allow Cisneros on its property because employees were fearful of him.[16]

On December 27, Cisneros was asked to leave a grievance meeting at Respondent's facility.

On December 27, Cisneros and Miranda were escorted from the lobby of Respondent's facility by Antonio Madrid, Union job steward, in order to meet Carolyn Ryzanych, manager of human resources, to discuss a grievance. Ryzanych approached them and stated, "the doctor [Dr. Mehta, owner of Respondent] doesn't want him [Cisneros] anywhere on the premises." Cisneros complied and left the premises.

CONCLUSIONS OF LAW

The issue in this case is whether there is persuasive evidence that the presence of Cisneros would create ill will and make good-faith bargaining impossible.

As the Board stated in *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), enfd. 670 F.2d 663 (6th Cir. 1982).

> It is well established that each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to

[14] After his termination, Cisneros attended five of the final six bargaining sessions.

[15] Herdita was not a member of Respondent's bargaining committee. As of September or October, Herdita no longer worked for Respondent.

[16] Respondent's counsel also referenced a temporary restraining order against Cisneros. However, this ground for exclusion of Cisneros from Respondent's property was withdrawn.

> deal with the chosen representative of the other party. However, where the presence of a particular representative in negotiations makes collective bargaining impossible or futile, a party's right to choose its representative is limited, and the other party is relieved of its duty to deal with that particular representative. The test, as stated in *KDEN Broadcasting* [225 NLRB 25] is whether there is *"persuasive evidence* that the presence of the particular individual would create ill will and make good-faith bargaining impossible." (footnote omitted)

Thus, the issue in the instant case is whether there is *persuasive evidence* that the presence of Cisneros "would create ill will and make good-faith bargaining impossible." Id.; see also *Sahara Datsun*, 278 NLRB 1044, 1046 (1986).

Characterizing this as a case of first impression dealing with the balance between the right of a Union to choose its representative versus the duty of an employer to provide a safe workplace, Respondent contends that it cannot allow Cisneros in its facility because employees fear him. I find this characterization unconvincing. The Board's analysis, requiring persuasive evidence of ill will and making good-faith bargaining impossible, subsumes the single issue of workplace safety. Accordingly, my analysis will proceed pursuant to Board authority.

The record is devoid of any evidence that Cisneros' presence at negotiations following the windshield incident created ill will and made good-faith bargaining impossible.

While on the picket line, Cisneros broke a windshield by hitting it with his fist. He also yelled at employees crossing the picket line and stood in front of some employees' cars while they were attempting to enter the facility. During this same period of time, Cisneros was discharged but continued to serve on the Union's negotiation committee. Cisneros was present at 5 of the 6 meetings following the picket line incident. The parties reached agreement on November 19, 2010. Respondent did not attempt to exclude Cisneros from the negotiation process. There is no evidence that Cisneros' presence during negotiations was a disruptive influence, created any ill will, or made good-faith bargaining impossible. Thus, I conclude as a matter of law that Cisneros presence at the bargaining table from July through November 2010 did not create ill will and make good-faith bargaining impossible.

On the record as a whole, I find there is not persuasive evidence that Cisneros' presence at the facility as a union business agent would create ill will and make good-faith bargaining impossible.

Cisneros hit the windshield of a supervisor's vehicle twice when the vehicle drove into Cisneros while he was picketing. Although I found that Cisneros acted recklessly in approaching the vehicle and I do not condone his actions, I found further that Supervisor Herdita was at fault when he continued to drive his vehicle into Cisneros' body, causing Cisneros to fall onto the hood of the vehicle. I found that Cisneros hit the windshield with his fist due to the provocation of the vehicle continuing to move forward while he was lying on the vehicle hood. The windshield cracked as a result of Cisneros' impact on it. I have further found that Cisneros and other picketers restricted ingress to the facility on some occasions while they were picketing. Finally, I have found that Cisneros and other picketers yelled at employees who crossed the picket line and that these employees yelled back at them. Both sides exchanged obscenities and polarized comments about the act of striking and/or the act of crossing a picket line.

These actions on the part of Cisneros do not constitute persuasive evidence that Cisneros presence at the facility to administer the contract and to negotiate would create ill will and make good-faith bargaining impossible. As I have previously noted, Cisneros' presence did not preclude reaching a first contract. Not only were Cisneros' actions on June 16 provoked, but I also note that they did not involve a member of the negotiating team or any current member of management. Finally, although Respondent presented evidence that some of its employees were frightened by Cisneros, I note that none of these employees are involved in negotiation. As to individuals involved in bargaining, the record is devoid of any evidence that these individuals observed Cisneros on the picket line or specifically on June 16.

In finding that there is not persuasive evidence that Cisneros' presence would create ill will and make good-faith bargaining impossible, I rely by analogy on *Claremont Resort and Spa*, 344 NLRB 832 (2005), in which a massage therapist attempted to enter a manager's office during an employee meeting with the manager. The massage therapist knew that she was not welcome at the meeting. As the massage therapist approached a security guard, their shoulders collided. Neither was injured nor lost their balance. The massage therapist used profanity during the incident and refused to follow directives not to enter the office. Following her discharge, the massage therapist became a full-time union organizer and representative. A three-member panel of the Board (Chairman Battista and Members Liebman and Schaumber) held that the employer violated the Act by refusing to deal with the union representative. See also, *Long Island Jewish Hillside Medical Center*, 296 NLRB 51, 71–72 (1989).

I find *King Soopers, Inc.*, 338 NLRB 269 (2002), distinguishable. In that case, union steward Gonzales requested leave to celebrate his 50th birthday and thereafter confronted his supervisor when he was nevertheless scheduled to work on that date. Gonzales threw his meat hook over his shoulder, narrowly missing a fellow employee. He also threw a 40-pound piece of meat into a saw, breaking the blade, and he threw his knife into a box. Then he threatened his supervisor and refused to leave the store at the store manager's order. He was discharged for this behavior. Four years later, Gonzales was assigned as a business representative and visited several stores, including the store from which he was discharged, in order to enforce the collective-bargaining agreements. Although no problems occurred on these visits, the employer thereafter refused to permit Gonzales into its stores due to his "violent and threatening" conduct 4 years earlier.

A three-member panel of the Board (Members Cowen and Bartlett; then Member, now Chairman Liebman dissenting) held that in light of Gonzales' egregious misconduct, the employer "might reasonably be preoccupied with the legitimate concern that [Gonzales] would react violently if his position did

not prevail." The majority held that such preoccupation undermines good-faith collective bargaining. Contrary to Gonzales' actions, Cisneros' action in hitting the windshield was defensive, provoked by his supervisor's failure to stop moving his vehicle forward once Cisneros fell onto the vehicle. Moreover, Cisneros' action did not endanger other employees or members of management.

Further, I find *Fitzsimons Mfg. Co.*, supra, 251 NLRB at 379, distinguishable. In *Fitzsimmons*, an international service representative of the union threatened to punch the company personnel director in the mouth and "knock him on his ass" if the personnel director referenced a confidential settlement agreement at bargaining. As the bargaining committee including employee representatives returned, the personnel director said, "I have one comment to make about. . . ." at which point the union representative reached across the desk, grabbed the personnel director by his tie, and pulled upwards. The personnel director came to his feet and the two were separated. The union representative challenged the personnel director to "come outside to the parking lot." The challenge was declined. Thereafter, the employer requested that the union representative be removed. A three-member panel of the Board (Members Jenkins and Penello; Member Truesdale dissenting) held that the union representative's actions were sufficiently egregious to make bargaining impossible. Because Cisneros' actions took place on a picket line, because they were defensive, and because they were not directed toward the substance of bargaining proposals, I find *Fitzsimmons* distinguishable.

In both *King Soopers* and *Fitzsimmons*, the Board found unprovoked violent behavior so egregious that it created ill will and made good-faith bargaining impossible. However, in the instant case, I have found that Cisneros' behavior was provoked by Herdita, who continued to move forward after Cisneros fell on the hood of the vehicle. I do not find that Cisneros' hitting the windshield was a violent action but rather I find it was a defensive act taken in order to call the driver's attention to his perilous position on the hood of the car and to obtain a halting of the car from moving forward. Under these circumstances and noting in particular that Cisneros continued to effectively serve on the negotiation committee following the incident, that the negotiating committee agreed upon an initial contract, and that Cisneros' Supervisor Herdita is no longer employed with Respondent, I find that there is not persuasive evidence that Cisneros presence created ill will or made good-faith bargaining impossible. Thus, by refusing Cisneros access to the facility, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to recognize or deal with Elmer Cisneros as a Business Agent for unit employees and by denying him access to the facility in order to perform his collective-bargaining duties, I recommend that Respondent be ordered to cease and desist and to affirmatively recognize and deal with Cisneros as a business agent for unit employees.

[Recommended Order omitted from publication.]